

DEPARTMENT OF STATE REVENUE

02-20140237.LOF
03-20140236.LOF**Letter of Findings Numbers: 02-20140237; 03-20140236
Corporate Income Tax & Withholding Tax
For Tax Years 2010 - 2012**

NOTICE: IC § 6-8.1-3-3.5 and IC § 4-22-7-7 require the publication of this document in the Indiana Register. This document provides the general public with information about the Department's official position concerning a specific set of facts and issues. This document is effective as of its date of publication and remains in effect until the date it is superseded by the publication of another document in the Indiana Register. The "Holding" section of this document is provided for the conveniences of the reader and is not part of the analysis contained in this Letter of Findings.

HOLDING

S Corporation failed to correctly and timely file returns relating to nonresident shareholders that resulted in tax liabilities, penalties, and interest being assessed.

ISSUE**I. Corporate Income Tax & Withholding Tax—S-Corp with Nonresident Shareholders.**

Authority: IC § 6-8.1-5-1; IC § 6-3-4-13; IC § 6-8.1-10-2.1; IC § 6-8.1-10-1; [IC 6-8.1-10-6](#); IC § 6-8.1-8-1.5; Dept. of State Revenue v. Caterpillar, Inc., 15 N.E.3d 579 (Ind. 2014); Indiana Dept. of State Revenue v. Rent-A-Center East, Inc., 963 N.E.2d 463 (Ind. 2012); Wendt LLP v. Indiana Dept. of State Revenue, 977 N.E.2d 480 (Ind. Tax Ct. 2012); Lafayette Square Amoco, Inc. v. Indiana Dept. of State Revenue, 867 N.E.2d 289 (Ind. Tax Ct. 2007); [45 IAC 15-11-2](#).

Taxpayer protests the imposition of tax, penalties, and interest.

STATEMENT OF FACTS

Taxpayer is an S Corporation located in Indiana. Taxpayer was audited by the Indiana Department of Revenue ("Department") for sales/use tax, corporate income tax, and withholding tax. Taxpayer filed a protest relating to corporate income tax and withholding tax (Taxpayer's protest letter stated that Taxpayer concurred with the sales and use tax audit. Thus that portion of the audit is not under protest). An administrative telephone hearing was conducted. Further facts will be supplied as required below.

I. Corporate Income Tax & Withholding Tax—S-Corp with Nonresident Shareholders.**DISCUSSION**

As a threshold issue, it is Taxpayer's responsibility to establish that the existing tax assessment is incorrect. As stated in IC § 6-8.1-5-1(c), "The notice of proposed assessment is prima facie evidence that the department's claim for the unpaid tax is valid. The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made." Indiana Dept. of State Revenue v. Rent-A-Center East, Inc., 963 N.E.2d 463, 466 (Ind. 2012); Lafayette Square Amoco, Inc. v. Indiana Dept. of State Revenue, 867 N.E.2d 289, 292 (Ind. Tax Ct. 2007). Consequently, a taxpayer is required to provide documentation explaining and supporting his or her challenge that the Department's position is wrong. Further, "[W]hen [courts] examine a statute that an agency is 'charged with enforcing . . . [courts] defer to an agency's reasonable interpretation of [the] statute even over an equally reasonable interpretation by another party.'" Dept. of State Revenue v. Caterpillar, Inc., 15 N.E.3d 579, 583 (Ind. 2014).

IC § 6-3-4-13 deals with corporations and nonresident shareholders. It also has provisions within the statute that deal with penalties (e.g. "(d) The provisions of [IC 6-8.1](#) relating to additions to tax in case of delinquency and penalties shall apply to corporations subject to the provisions of this section, and for these purposes any amount withheld, or required to be withheld and remitted to the department under this section, shall be considered to be the tax of the corporation, and with respect to such amount it shall be considered the taxpayer.").

The Department notes that negligence penalties are imposed pursuant to IC § 6-8.1-10-2.1. The Department also

notes [45 IAC 15-11-2\(b\)](#), which states:

"Negligence" on behalf of a taxpayer is defined as the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer. Negligence would result from a taxpayer's carelessness, thoughtlessness, disregard or inattention to duties placed upon the taxpayer by the Indiana Code or department regulations. Ignorance of the listed tax laws, rules and/or regulations is treated as negligence. Further, failure to read and follow instructions provided by the department is treated as negligence. Negligence shall be determined on a case by case basis according to the facts and circumstances of each taxpayer. (Emphasis added).

And [45 IAC 15-11-2\(c\)](#) provides in pertinent part:

The department shall waive the negligence penalty imposed under [IC 6-8.1-10-1](#) if the taxpayer affirmatively establishes that the failure to file a return, pay the full amount of tax due, timely remit tax held in trust, or pay a deficiency was due to reasonable cause and not due to negligence. In order to establish reasonable cause, the taxpayer must demonstrate that it exercised ordinary business care and prudence in carrying out or failing to carry out a duty giving rise to the penalty imposed under this section. Factors which may be considered in determining reasonable cause include, but are not limited to:

- (1) the nature of the tax involved;
- (2) judicial precedents set by Indiana courts;
- (3) judicial precedents established in jurisdictions outside Indiana;
- (4) published department instructions, information bulletins, letters of findings, rulings, letters of advice, etc;
- (5) previous audits or letters of findings concerning the issue and taxpayer involved in the penalty assessment.

Reasonable cause is a fact sensitive question and thus will be dealt with according to the particular facts and circumstances of each case.
(Emphasis added).

Regarding the interest, the Department notes that under IC § 6-8.1-10-1(e) interest cannot be waived.

IC § 6-8.1-10-2.1 is also applicable to Taxpayer's facts; that statute states in relevant part:

- (j) If a partnership or an S corporation fails to include all nonresidential individual partners or nonresidential individual shareholders in a composite return as required by [IC 6-3-4-12\(h\)](#) or [IC 6-3-4-13\(j\)](#), a penalty of five hundred dollars (\$500) per partnership or S corporation is imposed on the partnership or S corporation.

Given how corporate income taxes and withholding taxes are conceptually connected (in the context of a nonresident shareholder), this Letter of Findings ("LOF") will address both the corporate income tax protest and the withholding tax protest in one LOF. Taxpayer listed the items under protest by liability number, and for the purposes of consistency this LOF is organized in a similar manner.

Liability Number Ending 6190:

This liability relates to withholding tax. Taxpayer states in follow-up correspondence that the auditor "requested the filing of form WH-1 to accompany the amended composite return for 2010." Taxpayer states that withholding tax in the "amount of \$2,286 was paid with the amended composite return as directed by the Auditor, however, the amount shows as remaining due for form WH-1."

The Department notes that the \$2,286 payment was transferred from Taxpayer's corporate tax account with the Department to Taxpayer's withholding tax account with the Department. Since there was penalty and interest due as well, and given the order of how payments are applied (per IC § 6-8.1-8-1.5, partial payments are applied in the following order: towards penalty, then towards interest, and then towards the tax liability), Taxpayer has a remaining tax liability (albeit with a different liability number). Taxpayer has not met its burden of proof; Taxpayer's protest of this issue is denied.

Liability Number Ending 6192:

Taxpayer describes this issue as being the same as the one above. The Department's records show that Taxpayer has not paid on this liability number, thus Taxpayer owes the base tax, the penalty, and interest. This is for the year 2011, and in order to resolve the corporate liability ending in 6127, Taxpayer would need to pay the withholding liability number ending in 6192.

The Department also notes that for liability number ending 6191, Taxpayer also owes a \$20 penalty pursuant to [IC 6-8.1-10-6](#) ("(b) If a person fails to file an information return required by the department, a penalty of ten dollars (\$10) for each failure to file a timely return, not to exceed twenty-five thousand dollars (\$25,000) in any one (1) calendar year, is imposed.").

Again, Taxpayer has not met its burden of proof regarding these issues under IC § 6-8.1-5-1(c).

Liability Number Ending 6194:

Taxpayer states that this is a "duplicate penalty once again from filing of the withholding tax on the composite return." Taxpayer reported their withholding as \$15,258, and paid it late. The due date was April 15, 2013, and it was paid on October 11, 2013. Taxpayer initially made this payment towards its corporate account; however it should have been paid towards the nonresident withholding account. The Department corrected Taxpayer's error by transferring the payment from the corporate account to the withholding account. When penalty and interest are included, the \$15,258 payment did not satisfy the total liability. Regarding the duplicative penalty, see liability number ending 6127 above.

Also related to this is a 2012 liability ending in 6193, which again is a \$20 penalty pursuant to [IC 6-8.1-10-6](#).

Taxpayer's protest on this issue is denied for failure to meet its burden of proof.

Liability Number Ending 5080 and Liability Number Ending 5081:

Per Taxpayer this relates to a "Composite return, non-compliance penalty." Taxpayer states that the auditor told Taxpayer that there would not be a penalty if the "return [was] amended and tax [was] paid." Taxpayer states the "original corporate tax return was filed on time, the Shareholders both non-residents, take a salary with withholding taxes and file annual Indiana individual income tax returns, for which they pay taxes for salary and allocable income from the Indiana S-Corp." Taxpayer states:

Since all taxes were paid, there was no reason to file return except to comply with tax filing, therefore by complying it has cost he [sic] taxpayer thousands in penalties and interest for tax that was all paid timely.

Taxpayer failed to file required composite returns, thus under IC § 6-8.1-10-2.1(j) a penalty was properly imposed. Taxpayer's protest of this issue is denied.

Liability Number Ending 6829:

Taxpayer states that the protest for this liability is for a "[c]omposite return, non-compliance penalty" The penalty associated with this liability was abated in 2013, thus it is not clear what is being protested by the Taxpayer. Taxpayer has failed to present a sufficiently developed argument on this issue. See *Wendt LLP v. Indiana Dept. of State Revenue*, 977 N.E.2d 480, 485 n.9 (Ind. Tax Ct. 2012) (stating in a footnote parenthetical "that poorly developed and non-cogent arguments are subject to waiver" by the Indiana Tax Court) (quoting *Scopelite v. Indiana Dep't of Local Gov't Fin.*, 939 N.E.2d 1138, 1145 (Ind. Tax. Ct. 2010)).

Regarding Taxpayer's protest, Taxpayer has not met its burden of proof under IC § 6-8.1-5-1 and thus the protest is denied.

FINDING

Taxpayer's protest is denied.

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